



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

OCT 11 1996

REPLY TO THE ATTENTION OF:

C-29A

VIA U.S. MAIL

See Attached Addressee List

Re: Ohio Drum Reconditioning Site, Cleveland, Ohio
Unilateral Administrative Order,
EPA Docket No. V-W-96-C-360



Dear Counsel:

The United States Environmental Protection Agency ("U.S. EPA" or "the Agency") is in receipt of most of your individual proposals in response to the above-mentioned Unilateral Administrative Order ("UAO" or "Order"). By this letter, the Agency is informing you of its decision to extend the effective date of the UAO. This letter also responds to a number of issues raised in your letters.

The effective date will be extended by an amendment to the UAO signed by the Superfund Division Director, and will be extended sixty (60) days from the date of issuance of the amendment. During the period of this extension, U.S. EPA will forebear from conducting the removal action as long as no circumstances arise requiring a response by the Agency. We will also endeavor to identify and send information requests pursuant to Section 104(e) of CERCLA and, if appropriate, General Notices of Potential Liability, to additional potentially responsible parties ("PRPs").

The UAO Amendment will also extend the due dates for the following deliverables. Section 3.1 of the UAO will be amended to provide Respondents twenty (20) days after the amended effective date of the Order to submit a draft Work Plan for the removal action. Similarly, Section 3.2 of the UAO will be amended to allow Respondents to submit a Health and Safety Plan within twenty (20) days after the amended effective date. All other deadlines remain the same. However, please note that all these deadlines will be triggered by the amended effective date only.

These deadlines will not be extended further. The extensions should provide your clients ample time to form an organized group or committee and to comply with the UAO under its new effective date. When your common contact has been chosen, please inform me.

The proprietors of Ohio Drum, Mr. Freiberg and Mr. Tvert, identified each of your clients as a customer who provided barrels for cleaning and reconditioning. They did business for years with all of your clients. Some of them were regular customers for as long as 20 years. U.S. EPA thus considers the statements made by Mr. Freiberg and Mr. Tvert to be sufficient basis upon which to issue the General Notices of Potential Liability and the UAO. We therefore do not agree with your assertions that we "have no evidence". Further, while Ohio Drum's own practices contributed to the contamination, a substantial number of the sources of the hazardous materials that contaminated the Site were, allegedly, your clients. Persons who send drums to a facility to be reconditioned and cleaned by another are liable under CERCLA as persons who arranged for the disposal of hazardous substances, if the substances in such drums contaminate the site. See, e.g., U.S. v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985).

Polychlorinated biphenyls ("PCBs") are not the only hazardous substances "driving" this cleanup. The high levels of lead are also of concern. There will be in fact two cleanup levels for this Site - one for PCBs and one for lead. Thus, even if PCBs were not present at the Site, a removal action would still be conducted to excavate and dispose of the lead. Even if lead were not present at the Site, the levels of mercury, chromium, and polynuclear aromatic hydrocarbons ("PAHs") would still justify a removal action. Other numerous heavy metals, volatile organic compounds ("VOCs"), and semi-volatile organic compounds are also found at the Site, and may have synergistic effects that add to the risks. All of these hazardous substances will be subject to the cleanup, since they have all been inseparably co-mingled with the PCBs and the lead. The release into the environment of all these substances will incur response costs which, if paid out of the Superfund, the Agency may recover from the generators of these wastes pursuant to Section 107 of CERCLA. We therefore do not agree with your assertions that since your clients have not as yet been identified as a source of PCBs, they have no responsibility for the Site.

U.S. EPA believes that the primary source of contaminants in the swamp was the drum reconditioning facility (hereinafter referred to as the "industrial property"). Three soil samples were taken in 1991 on the industrial property. One sample was from a treatment pit which contains a drain down which wastewater from Ohio Drum's washing operation was disposed. The drain connected to a storm sewer which discharged to the swamp. The result of the sample from the pit was 64 ppm PCBs (Aroclor 1254). In May, 1981, Joe Fredle, U.S. EPA On-Scene Coordinator ("OSC"), observed such wastewaters overflowing the pit and going down the drain. U.S. EPA therefore does not agree with your representations that the swamp could not have been contaminated by hazardous substances from the industrial property.

The Agency is not precluding the possibility that there may have been additional sources for contaminants in the swamp and on the industrial property. Brookside Auto Parts, which is the current owner of the swamp, has received a General Notice of Potential Liability letter and will be added to the UAO. U.S. EPA has received an information request response from Centerior Energy, the owner of the nearby electrical substation. Centerior Energy states that it has no knowledge and no records relating to the disposal of any hazardous substances at the Site, and that the property is used only as an electrical distribution substation that steps down voltage. U.S. EPA will nevertheless continue to pursue this line of investigation, as well as others. U.S. EPA has attempted to determine whether there are other connections to the pipe which discharges to the swamp, and will continue to do so. The Agency will also continue to make inquiries of other businesses that are, or were, adjacent to the Site, to the extent that they can be identified. U.S. EPA has been informed that Binder Barrel operated a facility on the industrial property prior to Ohio Drum; however, we cannot locate Binder Barrel, nor any of the suspected principals of Binder Barrel. It is believed that they are all dead. As this demonstrates, U.S. EPA remains committed to investigating additional sources of the contamination on both parcels that comprise the Site.

U.S. EPA is, and has been, aware of the necessity of identifying not only Ohio Drum's sources of drums, but also Lomack Drum's. We have requested such information on several occasions. However, it is suspected that the operations of Lomack Drum and/or L. Grey Barrel (collectively referred to here as "Lomack") between 1981 and 1984 may not have led to the contamination of the swamp, at least through the disposal of wastewaters into the drain in the pit at the facility. Prior to Lomack's presence at the Site, Ohio Drum covered the pit and the drain with soil in an attempt to close the unit pursuant to the requirements or orders of the State of Ohio. After the attempted "closure" of the pit, U.S. EPA dug a diversion ditch in May, 1981 to prevent any further discharges from the swamp to the adjacent Big Creek. However, Lomack is still considered to be a liable party under Section 107 of CERCLA. Unless Lomack can establish that its operations resulted in the 100% destruction or recovery of all hazardous substances contained in the drums serviced by Lomack, Lomack is considered to be an operator on the industrial property at the time of disposal. Customers of Lomack who are identified as having sent drums to the facility for cleaning would also be considered liable, for arranging for the disposal of hazardous substances that contaminated the site.

Some of you have stated that your clients only acquired drums from Ohio Drum. It is U.S. EPA's understanding that generally, the drums that a customer received from Ohio Drum were the same drums that the customer sent to Ohio Drum for cleaning and reconditioning.

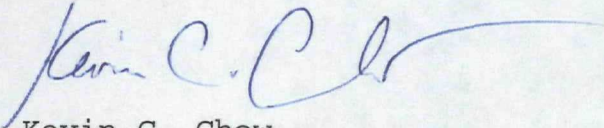
Some of you have also argued that a determination of an imminent and substantial endangerment cannot be supported when no action has been taken at the Site since 1981. In fact, when the Agency first learned of the Site in 1981, the Agency responded by using funds under the Clean Water Act to construct a diversion ditch and a berm to prevent further contamination of the swamp and Big Creek from the Ohio Drum property. More importantly, the sampling data currently known to U.S. EPA indicates that the Site is contaminated with high levels of PCBs and lead, as well as numerous other heavy metals, VOCs, PAHs, and semi-volatiles. This information amply supports the Agency's determination that there is an imminent and substantial endangerment to human health and the environment, and justifies U.S. EPA's decision to perform, or require the PRPs to perform, a removal action. An endangerment may be considered "imminent" if the factors giving rise to it are present, even though the actual harm may not be realized for years. B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 96 (D.Conn. 1988). Further, the fact that implementation of a cleanup may take a protracted time does not justify a finding that the threat to public health is any less imminent, nor that commencement of the correction process should be delayed. Id.

U.S. EPA disagrees with the claim that the Agency did not provide your clients with due process prior to the issuance of the UAO. U.S. EPA issued General Notices of Potential Liability to all of your clients prior to the issuance of the UAO, and provided them with an opportunity to perform the removal action themselves on a voluntary basis. Further, your clients have the post-deprivation right to seek reimbursement from the Superfund pursuant to a hearing under Section 106(b) of CERCLA. As alleged generators, your clients have no takings claim because they are not the landowners of either the swamp or the industrial property. Mr. Tvert and Mr. Freiberg and Brookside Auto Parts, as the current owners of the properties, do not have valid takings claims either since the Agency's intended response action is not disproportionate to the harm that is present on such properties. With respect to the UAO itself, we have offered and have held a formal meeting to discuss the Order. The Order also provides you an opportunity to submit written comments to the Order. Finally, your clients are not entitled to judicial review of this matter prior to the completion of the cleanup. See CERCLA §§ 113(h) and 106(b), 42 U.S.C. §§ 9613(h) and 9606(b).

Since I am the legal representative for the Agency in this matter, please direct all future communication and correspondence to me. Joseph Fredle, the On-Scene Coordinator, remains the technical contact at this Site.

If you have any questions, feel free to contact me at (312) 353-6181. My FAX number is (312) 886-7160.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin C. Chow", with a long horizontal flourish extending to the right.

Kevin C. Chow
Assistant Regional Counsel

Enclosure

cc: Joe Fredle (SE-W)
Debbie Regel (SE-5J)
Joe Kawecky (SE-5J)

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